

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
SEPTEMBER 15, 2009 Session

LAURA W. AUDIFFRED (BRIDGEWATER) v. JEFFREY S. WERTZ

**Direct Appeal from the Chancery Court for Williamson County
No. 31743 Timothy L. Easter, Chancellor**

No. M2009-00415-COA-R3-CV - Filed December 4, 2009

Upon the parties' divorce, Husband was ordered to pay transitional alimony. Based on Wife's remarriage, and thus, cohabitation, Husband filed a petition to terminate his alimony obligation. The trial court found that Wife had rebutted the statutory presumption that either she was supporting the third person or that the third person was supporting her, such that she no longer needed the alimony awarded. We affirm the trial court's denial of Husband's petition to terminate alimony, as well as its denial of Wife's request for attorney fees at trial. However, we award Wife her attorney fees incurred on appeal.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Jon S. Jablonski, Nashville, TN, for Appellant

Virginia L. Story, Franklin, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

Laura Bridgewater (“Wife”) and Jeffrey Wertz (“Husband”) were divorced pursuant to a “Final Decree” entered on May 5, 2006. Wife was awarded transitional alimony as follows: \$3,500.00 per month for twelve months, \$3,000.00 per month for twelve months, and \$2,000.00 per month for forty-eight months.¹

Wife began cohabitating with Christopher Lynn Bridgewater following their marriage on June 25, 2008. Husband filed a “Petition to Modify Final Decree” on August 28, 2008, seeking to terminate his alimony obligation based on Wife’s cohabitation. Following a bench trial, the trial court denied Husband’s petition. The trial court acknowledged that Wife’s cohabitation raised a presumption that either she was supporting Mr. Bridgewater, or that he was supporting her, such that Wife did not need the support previously awarded. However, the trial court found that Wife had successfully rebutted this presumption by presenting evidence that she and Mr. Bridgewater “divided up the household bills” and by demonstrating her continued need for support. Husband appeals.

II. ISSUES PRESENTED

Appellant has timely filed his notice of appeal and presents the following issue for review, summarized as follows:

1. Whether the trial court abused its discretion in failing to modify the alimony award.

Additionally, Appellee raises the following issues:

1. Whether the trial court erred in classifying the alimony as transitional rather than rehabilitative;
2. Whether the trial court erred in failing to award Wife her attorney fees at trial; and
3. Whether Wife should be awarded her attorney fees on appeal.

For the following reasons, we affirm the trial court’s denial of Husband’s petition to terminate alimony, as well as its denial of Wife’s request for attorney fees at trial. However, we award Wife her attorney fees incurred on appeal.

¹ The forty-eight month \$2,000.00 payment period began on May 1, 2008.

III. STANDARD OF REVIEW

Modification of a spousal support award is factually driven. *Perry v. Perry*, 114 S.W.3d 465, 466 (Tenn. 2003) (citing *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). Thus, a trial court's decision concerning modification is "given wide latitude within the trial court's range of discretion." *Id.* at 466-67. (citing *Watters*, 22 S.W.3d at 821). "The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives." *Bronson v. Umphries*, 138 S.W.3d 844, 851 (Tenn. Ct. App. 2003) (citing *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000)). "[W]e will set aside a discretionary decision if it does not rest on an adequate evidentiary foundation or if it is contrary to the governing law[.]" *Id.* However, "we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative." *Id.* We accord great deference to a trial court's determinations on matters of witness credibility and will not re-evaluate such determinations absent clear and convincing evidence to the contrary. *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted). We review a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

A. Classification of Alimony

This is the second time these parties have been before this Court. Husband initially appealed in August of 2006 following the entry of the "Final Decree." *Audiffred v. Wertz*, No. M2006-01877-COA-R3-CV, 2007 WL 2096004, at *1 (Tenn. Ct. App. July 19, 2007). As this Court noted, Husband "appeal[ed] every aspect of the trial court's ruling[.]" *Id.* Specifically, Husband contended that he should have been named the primary residential parent, that, alternatively, he should have been allowed greater visitation, that the division of the marital estate was inequitable, and that the awards of alimony and attorney fees were excessive. *Id.*

In our prior opinion's recitation of the facts, we noted that "Wife was . . . awarded transitional alimony for six years." *Id.* at *2. We also stated as follows:

We find no error with the numerous decisions of the trial court with the exception of one aspect of the parenting plan, that being that the husband is deprived of visitation for eleven straight days every two week visitation cycle. Thus, we modify the permanent parenting plan to afford him a more customary visitation every week *and affirm the trial court in all other respects.*

Id. at *1. (emphasis added). However, in our prior opinion we also stated that “This record supports a grant of *rehabilitative* support and we are unable to conclude that the trial court erred by granting alimony on a graduated scale for a period of six years.” *Id.* at *4. (emphasis added). In the instant appeal, Wife cites this language as support for her contention that this Court altered the alimony award from transitional to rehabilitative.

The classification of alimony as transitional or rehabilitative is of great significance in this case, as cohabitation raises a presumption that transitional alimony should be modified or terminated; however, it does not raise such a presumption regarding rehabilitative alimony. ***See Tenn. Code Ann. § 36-5-121(g)(2)(C)(2005).*** At the trial on Husband’s “Petition to Modify,” Wife argued that this Court’s prior opinion altered her alimony award from transitional to rehabilitative. In rejecting Wife’s contention, the trial court stated:

The Court has reviewed the prior trial Court Final Decree and the Court of Appeals opinion affirming the trial court[’]s alimony award and finds that the alimony in this cause is transitional alimony. The Court finds that the Courts of Appeals[’] simple reference to the word [“]rehabilitative alimony[”] did not change the trial court[’]s award of transitional alimony.

We agree. Importantly, we note that in the initial appeal to this Court, neither party challenged the alimony’s classification. We find that our isolated reference to “rehabilitative support” evidenced no intention to reclassify the alimony awarded. This issue is without merit.

B. Tenn. Code Ann. § 36-5-121(g)

Under Tennessee Code Annotated section 36-5-121(g), transitional alimony is nonmodifiable unless (1) the parties agree otherwise in an agreement incorporated into a court order; (2) the court orders otherwise; or (3) the alimony recipient begins living with a third person. ***Tenn. Code Ann. § 36-5-121(g)(2)(2005).*** The alimony recipient’s cohabitation raises a rebuttable presumption that:

- (i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or
- (ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

Tenn. Code Ann. § 36-5-121(g)(2)(C)(2005).

In its “Order” denying Husband’s request to terminate alimony, the trial court acknowledged that Husband was entitled to the statutory presumption raised by cohabitation, but it found that Wife

had successfully rebutted the presumption by providing evidence that she and Mr. Bridgewater “divided up the household bills” and by demonstrating her continuing need for the alimony awarded. On appeal, Husband argues that the evidence preponderates against the trial court’s finding that neither Wife nor Mr. Bridgewater was supporting the other.

At trial, Mr. Bridgewater testified that he “brought home” “between \$1200 and \$1300” bi-weekly, which he deposited into a checking account owned jointly with Wife, and he claimed monthly expenses of \$2,489.70. Mr. Bridgewater admitted that Wife used her line of credit to pay off some of his expenses, including a Jeep, \$1,448.00 in tuition, and two medical bills. However, he testified that by depositing his paycheck into their joint account, he repays Wife as follows: \$300 monthly for the Jeep, \$116.67 monthly for tuition, and \$145.83 monthly for medical bills. Additionally, he stated that Wife paid off a \$2,000.00 penalty he incurred for breaching a home lease/purchase agreement, but he claimed that he and Wife “swapped out the medical insurance increase and the house contract[;]” thus, he repays Wife by incurring a monthly paycheck deduction of \$166.00 for family medical insurance.

Bridgewater pays² one-fifth of certain household expenses as follows: \$400.00 towards the mortgage, \$42.80 for natural gas, \$24.00 for water, \$36.20 for electricity, \$100 for home repairs, \$29.20 for television and internet, and \$13.00 for home owners’ association dues. Mr. Bridgewater testified that he would have paid these expenses regardless of whether or not he lived with Wife, and further that he was not contributing to Wife’s expenses, but he was merely “paying for [his] part.” While this testimony may show that Wife does not contribute to Mr. Bridgewater’s support, some of his payments evidence his support of Wife. Specifically, Mr. Bridgewater’s contribution to the mortgage, association dues, home repairs, television and internet benefit Wife, as the cost of these items does not increase based upon the number of consumers. Additionally, Mr. Bridgewater’s consumption of electricity and natural gas arguably increase such bills only negligibly. Thus, we find that Mr. Bridgewater was contributing to Wife’s support in the amount of \$621.20 per month.³

Our inquiry does not end upon finding that a third person is contributing to the support of the recipient spouse. Pursuant to Tennessee Code Annotated section 36-5-121(g)(2)(C), we must determine whether such contribution terminates or reduces the recipient spouse’s need for the alimony awarded. Wife’s monthly income is \$7,784.00, including job earnings, child support, and \$2,000.00 in alimony. Wife’s monthly expenses total \$7,826.00. Thus, even with Mr. Bridgewater’s contribution to the household expenses, Wife has a monthly deficit of \$42.00. Because Wife has rebutted the presumption that “the alimony recipient does not need the amount of support previously

² Mr. Bridgewater “pays” his share of these expenses by depositing his check into his joint account with Wife, who then writes a check from the account to cover the expenses. Apparently, five people live in the household—Mr. Bridgewater, Wife, and three of Wife’s four children. Wife has two children from her marriage to Husband as well as two from a previous marriage.

³ The \$621.20 total is calculated as follows: \$400 mortgage, \$13 association dues, \$100 home repairs, \$29.20 television and internet, \$36.20 electricity, and \$42.80 natural gas.

awarded,” we affirm the trial court’s denial of Husband’s petition to modify the alimony award. **Tenn. Code Ann. § 36-5-121(g)(2)(C)(i)(2005).**

C. Attorney Fees

The trial court ordered Husband to pay all costs associated with his petition to modify alimony. However, it denied Wife’s request that her attorney fees be paid by Husband, instead ordering each party to pay his or her own attorney fees. An award of attorney fees in a divorce case is “within the sound discretion of the trial court, and unless the evidence preponderates against the award, it will not be disturbed on appeal.” ***Kincaid v. Kincaid***, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995) (citing *Lyon v. Lyon*, 765 S.W.2d 759, 762-63 (Tenn. Ct. App. 1988)). We find no abuse of discretion in the trial court’s denial of attorney fees to Wife.

Finally, Wife seeks an award of attorney fees on appeal. The decision whether to award attorney fees on appeal is within the sound discretion of this Court. ***See Archer v. Archer***, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). We find it equitable to award Wife her attorney fees incurred in the defense of this appeal and we remand to the trial court for a determination of her reasonable fees in this matter.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the chancery court. Further, we award attorney fees incurred on appeal to Appellee. The matter is remanded to the trial court to determine the amount of fees that are reasonable and necessary in this case. Costs of this appeal are taxed to Appellant, Jeffrey S. Wertz, and his surety, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.